

## Marquette Sports Law Review

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Volume 26

Issue 2 Symposium: *The Changing Landscape of  
Collegiate Athletics*

Article 6

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### Repository Citation

Thomas J. Horton, Drew DeGroot, and Tyler Custis, *Addressing the Current Crisis in NCAA Athletics: Where is Congress?*, 26 Marq. Sports L. Rev. 363 (2016)

Available at: <http://scholarship.law.marquette.edu/sportslaw/vol26/iss2/6>

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# ADDRESSING THE CURRENT CRISIS IN NCAA INTERCOLLEGIATE ATHLETICS: WHERE IS CONGRESS?

THOMAS J. HORTON, DREW DEGROOT & TYLER CUSTIS \*

## I. INTRODUCTION

American intercollegiate athletics are in a state of crisis today.<sup>1</sup> Our time-honored and revered traditions of placing academics, amateurism, and fair play ahead of commercialism and professionalism are under siege.<sup>2</sup> As intercollegiate athletics programs, especially football and basketball, generate billions of dollars in annual revenues for their academic institutions and the

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1. See, e.g., Edward H. Grimmer, Comment, *NCAA Amateurism and Athletics: A Perfect Marriage or a Dysfunctional Relationship? – An Antitrust Approach to Student-Athlete Compensation*, 30 *TOURO L. REV.* 823, 859 (2014) (“Instead of acting in the student-athletes’ best interests, [NCAA] member institutions have clearly become motivated by economic concerns.”); William E. Kirwan & R. Gerald Turner, *Changing the Game: Athletics Spending in an Academic Context*, *TRUSTEESHIP MAG.* (Sept./Oct. 2010), <http://agb.org/trusteeship/2010/septemberoctober/changing-the-game-athletics-spending-in-an-academic-context> (arguing that “rising expenses—and the pursuit of more revenue to support college sports—have become a destabilizing force for many institutions, regardless of athletic mission or program size”); Brian C. Mitchell, *Show Me the Money: The Growing Financial Crisis in College Athletics*, *ACADEME BLOG* (June 1, 2015), <https://academeblog.org/2015/06/01/show-me-the-money-the-growing-financial-crisis-in-college-athletics/> (questioning whether “most college athletic programs – as currently constituted – continue to make financial sense”); Bob Wuornos, *When High-Profile Stars Get Paid, Will Real Amateurs Suffer?*, *NAT’L REV. ONLINE* (Jan. 17, 2015), <http://www.nationalreview.com/article/411740/future-other-college-sports-bob-wuornos> (discussing ongoing debates “that could shake the very foundations of Division I (D1) sports” and questioning whether “the looming professionalization of revenue-generating” sports can be stopped “from decimating the non-revenue-generating sports, and indeed the very spirit of amateur athletics”).

2. See, e.g., Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?*, 41 *PEPP. L. REV.* 229, 230–32 (2014) (discussing the long history of antitrust suits against the National Collegiate Athletic Association and the “increasing[] receptiv[ity] of courts[] to the idea that NCAA football and basketball players may be sufficiently involved in commercial activity to warrant closer inspection of their antitrust claims”).

entertainment industry,<sup>3</sup> the idea that student-athletes should not share more equally in the economic bonanza is being attacked through a cacophony of antitrust and employment law cases.<sup>4</sup> These cases require the courts to balance a complex web of competing and often conflicting social, moral, and economic values, norms, and objectives.<sup>5</sup>

This Article reviews the historic developments and legal trends that have led to the current crisis facing intercollegiate athletics. Based on our analysis, we argue that a continuing fusillade of antitrust challenges is not the best way to balance the diverse values and objectives at stake.<sup>6</sup> Instead, it is time for a national dialogue, abetted by congressional studies and legislative action, that leads to a more rational and sensitive balancing of the social, moral, and economic values and objectives engendered by intercollegiate athletics.

In Part II, we discuss the genesis of the current crisis and review the precarious balance of conflicting and competing interests facing the National Collegiate Athletic Association (NCAA) and its member educational institutions.

In Part III, we review the historic series of antitrust and employment law cases involving the NCAA and student-athletes. We note that the courts' efforts to balance the competing commercial and non-commercial values and objectives at stake have produced a hodge-podge of confusing and often conflicting decisions. We additionally discuss the current cutting-edge antitrust and employment law cases being pursued by student-athletes against the NCAA and its member institutions.

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3. See, e.g., Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74 n.11 (2006) ("College sports is a multi-billion-dollar industry.").

4. See, e.g., Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 ARIZ. L. REV. 475, 476–77 (2015) (footnote omitted) (citing Richard E. Bartok, Note, *NFL Free Agency Restrictions Under Antitrust Attack*, 1991 DUKE L.J. 503, 506–08 (1991); Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263 (1993); Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519 (1997)) ("Courts have played a crucial role in regulating change in professional sports, and now students are asking courts to play a similar role in college athletics.").

5. See, e.g., HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS 128–29 (1929) (discussing "[t]he moral qualities that participation in college athletics is widely supposed to engender," and "[t]he impairment of moral stamina" resulting from commercialization and dishonesty); Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 257 (2014) ("Recognition of amateurism as a legitimate procompetitive benefit asks courts to balance the anticompetitive *economic* effects of restrictions on student-athletes with the *social* benefits of amateurism to college sports.").

6. See, e.g., Feldman, *supra* note 5, at 257–58 (arguing that the antitrust laws are "not equipped or designed to balance social welfare with economic effects").

In Part IV, we address the need for a national dialogue that will lead to a democratic legislative balancing of the conflicting and competing social, moral, and economic values and interests implicated by intercollegiate athletics. We conclude that future expeditious democratic congressional review and oversight is preferable to the current spate of discordant legal decisions being generated through balkanized judicial intervention.

## II. THE CURRENT CRISIS IN NCAA INTERCOLLEGIATE ATHLETICS

Intercollegiate athletics today are in a state of crisis. Intercollegiate athletics' growing crisis results from the need to balance a precarious mixture of deeply conflicting and clashing fundamental social, moral, and economic values. On one side are the core social and moral values of amateurism, academics, and fair sportsmanship.<sup>7</sup> For example, the NCAA Bylaws state: "Member institutions' athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports."<sup>8</sup> The NCAA Bylaws are designed to promote and protect "a revered tradition of amateurism in college sports."<sup>9</sup>

On the other side are the economic values of commercialism, revenue generation, and entertainment.<sup>10</sup> "[I]ntercollegiate athletics has become a dazzling commercial activity."<sup>11</sup> Intercollegiate sports today are a huge

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7. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 121, 134–135 (1984) (White, J., dissenting); *Bloom v. NCAA*, 93 P.3d 621, 626 (Colo. App. 2004) (quoting 2003-04 NCAA DIVISION I MANUAL art 2.9 (2003)) ("Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."). In *Board of Regents*, Justice White observed that "[t]he NCAA's member institutions have designed their competitive athletic programs 'to be a vital part of the educational system.'" *Bd. of Regents*, 468 U.S. at 121 (White, J., dissenting) (citing 1982-83 NCAA MANUAL art II, § 2(a) (1982)).

8. 2013-14 NCAA DIVISION I MANUAL art 12.01.2 (2013) [hereinafter NCAA MANUAL]; see also Grimmer, *supra* note 1, at 828 ("The NCAA established itself as a non-profit organization with amateurism acting as the foundation.").

9. *Bd. of Regents*, 468 U.S. at 120. Justice Stevens went on to note "that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics." *Id.*

10. See, e.g., Rodney K. Smith, Essay, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 21 (2000) ("Over the past 150 years, the desire to win at virtually any cost, combined with the increases in public interest in intercollegiate athletics, in a consumer sense, have led inexorably to a highly commercialized world of intercollegiate athletics.").

11. McCormick & McCormick, *supra* note 3, at 155; see also Matthew J. Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 841 (2014) ("[T]he commercialization of college

entertainment business through which “[a]n enormous cast of participants harvests a wealth of riches.”<sup>12</sup> “Commentators have long derided the stubborn ‘myth of amateurism,’ noting that the NCAA has morphed into a profit-seeking machine that serves the decidedly professional and economic function of regulating college sports.”<sup>13</sup> Indeed, “it would be fanciful to suggest that colleges are not concerned about the profitability of their ventures . . . [even though] other, non-commercial goals play a central role in their sports programs.”<sup>14</sup> Former NCAA Executive Director (from 1951 to 1988) Walter Byers went so far as to attack the NCAA’s regulation of intercollegiate sports as “a nationwide money-laundering scheme.”<sup>15</sup>

However one feels about such allegations and characterizations, it cannot be denied that intercollegiate sports today are a multi-billion dollar

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sports directly reflects the marketplace realities of our society.”).

12. Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496 (2008). The authors observe,

Universities derive enormous revenues and other indirect, but vital, benefits from successful athletic programs. Corporations that sponsor athletic contests gain valuable exposure for their products and services. The NCAA supports itself entirely by revenues generated from selling broadcasting rights of its members’ games. Many coaches are compensated lavishly for producing successful programs. Media enterprises generate rich advertising revenues by airing college athletic events.

*Id.* (footnotes omitted) (citing McCormick & McCormick, *supra* note 3, at 75–76); *see also* McCormick & McCormick, *supra* note 3, at 75–76, 131 (“A broad array of participants in college sports harvests a wealth of riches,” and, “College sports is a fabulously profitable commercial enterprise as well as a lucrative component of the sports-entertainment industry. Athletes generate great wealth for their university-employers through their skill and effort.”).

13. Feldman, *supra* note 5, at 250 (footnote omitted) (citing McCormick & McCormick, *supra* note 12, at 496; Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), [www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/](http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/)) (“[Commentator] criticism has only amplified over the last decade with the birth of billion dollar television deals, expanding tournament fields, and, of course, conference realignment.”).

14. *Bd. of Regents*, 468 U.S. at 121 (White, J., dissenting) (quoting J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.12 (1979)); *see also* Agnew v. NCAA, 683 F.3d 328, 347 (7th Cir. 2012) (“[Intercollegiate sports activities] are all part of the competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain.”); Justin M. Hannan, Case Comment, *Antitrust Law—Seventh Circuit Sees Through Façade, Exposes NCAA Scholarship Limits to Sherman Antitrust Scrutiny*—Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012), 18 SUFFOLK J. TRIAL & APP. ADVOC. 345, 350–57 (2013) (arguing that NCAA student-athletes are engaged in commercial activities).

15. WALTER BYERS WITH CHARLES HAMMER, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES* 73 (1995). Former NYU Chancellor L. Jay Oliva similarly stated in 1986, “The university that allows itself to feed off its sports program financially becomes dependent on the feeding—even addicted, if you will.” L. Jay Oliva, *A Challenge to Coaches: Special Opportunities Must Not Be Wasted*, SPORTING NEWS, Dec. 1, 1986, at 32.

entertainment business. The NCAA's own revenues during the 2014 fiscal year totaled nearly \$1 billion and included a surplus of nearly \$80.5 million.<sup>16</sup> According to Forbes, "[t]he NCAA annually produces nearly \$11 [b]illion in revenue from the operation of college sports – more than the estimated league totals for either the National Basketball Association and the National Hockey League."<sup>17</sup> College football revenue alone in 2013 topped \$3.4 billion, according to data released by the Department of Education.<sup>18</sup> Quite simply, there can be little doubt that intercollegiate sports have become a "multi-billion dollar entertainment product[]."<sup>19</sup>

The NCAA is the organization tasked with overseeing and regulating intercollegiate sports' precarious balance of social, moral, and economic values.

Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities.<sup>20</sup>

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16. Steve Berkowitz, *NCAA Nearly Topped \$1 Billion in Revenue in 2014*, USA TODAY (Mar. 11, 2015), <http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/>.

17. Marc Edelman, *How NCAA Greed Has Led to a Student-Athlete Uprising*, FORBES (Feb. 11, 2014), <http://www.forbes.com/sites/marcedelman/2014/02/11/how-ncaa-greed-has-led-to-a-student-athlete-uprising/#2010756b4f01>. In 2013, "the University of Alabama [alone] reported \$143.3 million in athletic revenues — more than the revenues of each of 30 NHL teams, and 25 of the 30 NBA teams." *Id.*; see also Grimmer, *supra* note 1, at 823 (footnotes omitted) (citing Pete Thamel, *With Big Paydays at Stake, College Teams Scramble for a Spot*, N.Y. TIMES (Sept. 19, 2011), [http://www.nytimes.com/2011/09/20/sports/ncaafotball/in-conference-realignment-colleges-run-to-payday-light.html?\\_r=0](http://www.nytimes.com/2011/09/20/sports/ncaafotball/in-conference-realignment-colleges-run-to-payday-light.html?_r=0); Michael Smith, *Collegiate Licensing Explodes in CLC's 30 Years*, SPORTSBUSINESS J. (June 13, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/06/13/Colleges/CLC-at-30.aspx>) ("The NCAA and its member institutions generate billions of dollars through television revenue. Additionally, the NCAA and its licensing affiliate, The College Licensing Company ("CLC"), procure large profits through the licensing of the names and images of student-athletes.").

18. Cork Gaines, *College Football Reaches Record \$3.4 Billion in Revenue*, BUS. INSIDER (Dec. 17, 2014), <http://www.businessinsider.com/college-football-revenue-2014-12>.

19. Feldman, *supra* note 5, at 255 (citing McCormick & McCormick, *supra* note 12, at 505–20) (arguing "that the NCAA has become a profit-seeking enterprise that governs multi-billion dollar entertainment products"); see also McCormick & McCormick, *supra* note 12, at 496.

20. NCAA v. Bd. of Regents, 468 U.S. 85, 121 (1984) (White, J., dissenting) (citing Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 656–57 (1978)). For an excellent historical review of the factors leading to the founding of the NCAA, see Smith, *supra* note 10, at 10–13. See also Grimmer, *supra* note 1, at 827 ("The NCAA is a non-profit entity that acts as a regulator

Today, “[t]he NCAA has grown to include some 1,100 member schools, organized into three divisions: Division I, Division II, and Division III.”<sup>21</sup>

Unfortunately, commercialization and the attendant problems of colleges seeking to gain unfair competitive advantages are deeply rooted in the history of intercollegiate athletics.<sup>22</sup> For example, by the late Nineteenth Century, Harvard’s President, Charles Eliot, became so concerned about the impact of commercialization of intercollegiate athletics that he “charg[ed] that ‘lofty gate receipts from college athletics had turned amateur contests into major commercial spectacles.’”<sup>23</sup> “Rising concerns regarding the need to control the excesses of intercollegiate athletics” led President Theodore Roosevelt to “call[] for a White House conference to review [intercollegiate] football rules.”<sup>24</sup> A “combined effort on the part of educators and the White House eventually led to a concerted effort to reform intercollegiate football rules,” which in turn led to the formation of the NCAA in 1905 (originally known as the Intercollegiate Athletic Association).<sup>25</sup>

Since the NCAA’s inception in 1905, member schools have been forced to “wrestle[] with the same issues that we face today: the extreme pressure to win, which is compounded by the commercialization of sport, and the need for regulations and a regulatory body to ensure fairness and safety.”<sup>26</sup> As the

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of amateur athletics and works closely with its member universities to promote excellence in athletics as well as academics.”).

21. *O’Bannon v. NCAA*, 802 F.3d 1049, 1053 (9th Cir. 2015). The Ninth Circuit additionally noted that “Division I schools are those with the largest athletic programs—schools must sponsor at least fourteen varsity sports teams to qualify for Division I—and they provide the most financial aid to student athletes. Division I has about 350 members.” *Id.*

22. For example, the famous Harvard–Yale rowing regatta, which dates back to 1852, was plagued in its earliest years by Harvard trying to gain an unfair competitive advantage through the use of an athlete not enrolled as a student at Harvard. *See* Smith, *supra* note 10, at 10–11; *see also* Rodney K. Smith, *The National Collegiate Athletic Association’s Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 1057 (1987) (discussing the 1985 efforts “of the Presidents Commission and the NCAA to restore academic integrity to intercollegiate athletic programs”).

23. Rodney K. Smith, *Little Ado About Something: Playing Games with the Reform of Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 567, 570 (1991) (quoting John S. Watterson, *Inventing Modern Football*, AM. HERITAGE, Sept.–Oct. 1988, at 105). Smith further notes, “The commercialization of intercollegiate athletics, including the payment of compensation to the best athletes, was well entrenched by the latter part of the nineteenth century.” Smith, *supra* note 22, at 989.

24. Smith, *supra* note 10, at 12 (footnote omitted) (citing GEORGE W. SCHUBERT ET AL., *SPORTS LAW* 1 (1986); Smith, *supra* note 22, at 990).

25. *Id.* (footnote omitted) (citing Smith, *supra* note 22, at 991; SCHUBERT ET AL., *supra* note 24, at 2).

26. *Id.* (citing Smith, *supra* note 23, at 571). Smith adds that “the commercialization and propensity to seek unfair advantages existed virtually from the beginning of organized intercollegiate athletics in

popularity of intercollegiate athletics in the United States has grown, the NCAA has found itself trying to successfully balance a series of complex and conflicting social, moral, and economic goals and objectives. For example, in 1929, the Carnegie Foundation for the Advancement of Education issued a report noting the need to better control the increasing commercialization of intercollegiate sports through “[a] change of values.”<sup>27</sup> The Carnegie Report called for college presidents to reclaim the integrity and social morality of college athletics by minimizing their growing commercial and professional nature.<sup>28</sup>

Today, nearly nine decades after the Carnegie Report called for a fundamental change in intercollegiate sports’ values, the NCAA finds itself again enmeshed in the vortex of a complex clash of values centered around the issue of fairly compensating student-athletes. As the revenues from intercollegiate sports, especially football and basketball, have mushroomed, the calls from student-athletes to share more equally in the financial bonanza have risen exponentially.<sup>29</sup> As noted by Arizona State University Professor Rodney

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the United States. The problem of cheating, which was no doubt compounded by the increasing commercialization of sport, was a matter of concern.” *Id.* at 11; *see also* SAVAGE ET AL., *supra* note 5, at 128–29 (“[O]ur study of the recruiting and subsidizing of college athletes affords much direct evidence that college athletics can breed, and, in fact, have bred, among athletes, coaches, directors, and even in some instances among college administrative officers, equivocation and dishonesty, which actual participation has not removed or prevented.”).

27. Smith, *supra* note 10, at 13 (quoting Smith, *supra* note 22, at 991). The Carnegie Foundation’s report stated, in part,

a change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created. Commercialism in college athletics must be diminished and college sports must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth . . . to exercise at once the body and the mind and to foster habits [of] both bodily health and . . . high qualities of character . . . .

Smith, *supra* note 22, at 991 (alterations in original) (quoting GEORGE MASON UNIV. & THE AM. COUNCIL ON EDUC., ADMINISTRATION OF UNIVERSITY PROGRAMS: INTERNAL CONTROL AND EXCELLENCE 22 (1986)).

28. *See* Smith, *supra* note 10, at 13–14.

29. *See, e.g.,* McCormick & McCormick, *supra* note 3, at 74.

By creating and fostering the myth that football and men’s basketball players at Division I universities are something other than employees, the NCAA and its member institutions obtain the astonishing pecuniary gain and related benefits of the athletes’ talents, time, and energy—that is, their labor—while severely curtailing the costs associated with such labor.



K. Smith, “As the role of television and the revenue it brings to intercollegiate athletics has grown in magnitude, the desire for an increasing share of those dollars has become intense.”<sup>30</sup>

Student-athletes’ growing economic demands are butting up against many university faculty and educators’ fears that a swelling tide of intercollegiate athletic commercialization may be threatening educational institutions’ academic values.<sup>31</sup> In response to such concerns, the NCAA has sought to introduce and implement processes and procedures designed “to enhance academic integrity and revitalize the role of faculty and students in overseeing intercollegiate athletics.”<sup>32</sup> For example, the NCAA introduced a certification process designed to ensure that prospective student-athletes meet minimum academic standards to compete.<sup>33</sup>

Another fast-growing set of fundamental social values the NCAA must balance against its members’ economic interests arises from “Title IX, with its call for gender equity in intercollegiate athletics.”<sup>34</sup> Because women’s sports programs generally do not produce enough revenue to cover their costs, an “increase in net expenses has placed significant [economic] pressure on intercollegiate athletic programs.”<sup>35</sup> Such economic and financial pressures

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*Id.* See also Grimmett, *supra* note 1, at 860 (arguing that “[t]he NCAA and its member institutions should reward athletes for their accomplishments while maintaining its foundational principles”); Sherman J. Clark, Response, *College Sports and the Antitrust Analysis of Mystique*, 71 WASH. & LEE L. REV. ONLINE 215, 229 (2015) (arguing that allowing student-athletes to sign endorsement deals “would solve some of the fairness and exploitation problems”).

30. Smith, *supra* note 10, at 19.

31. See *id.* at 16–17.

32. *Id.* at 21 (citing Smith, *supra* note 22, at 1058).

33. *Id.* Under this certification process, NCAA schools must conduct in-depth self-studies covering such areas as “Governance and Rules Compliance, Academic Integrity, Fiscal Integrity, and a Commitment to Equity. This process helps institutions focus on academic values and related issues.” *Id.* (footnote omitted) (citing Smith, *supra* note 23, at 573–74, 576).

An example of an academic report that must be conducted by member institutions is the Academic Progress Rate (APR). An APR report is a calculation of an institution’s success in retention, eligibility, and graduation of student-athletes for their individual sports. If institutions fail to submit an APR report, the individual athletes and team are precluded from competing in any postseason competition. In addition, schools that do not reach the minimum APR, as set forth by the NCAA, are also excluded from postseason competition. See NCAA MANUAL, *supra* note 8, art 14.02.1. The profound implications of such rules are shown by the punishments administered to the University of Connecticut 2012 national champion men’s basketball team. The returning NCAA national champions for the 2011–2012 basketball season did not meet the minimum APR score and were ineligible for postseason competition for the 2012–2013 basketball season. See Andy Katz, *UConn Loses Final Appeal*, CSNBBS, <http://cincinnati.csnbbs.com/thread-564615-post-7769517.html#pid7769517> (last updated Apr. 6, 2012).

34. Smith, *supra* note 10, at 19–20 (citing Rodney K. Smith, *When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 367 (1996)).

35. *Id.* at 20. In all fairness, it should be noted that most men’s NCAA sports do not generate

have led many schools to seek to increase their revenue from such popular sports as football, basketball, and increasingly, baseball. Further exacerbating such economic worries are concerns that “most of the revenue producing male sports are made up predominately of male student-athletes of color.”<sup>36</sup> This raises additional social issues of racial fairness and equity that must be balanced by the NCAA in setting and implementing its regulatory policies.<sup>37</sup>

Against this complex backdrop of competing and conflicting values and issues, the NCAA has sought to protect the long-revered traditions of amateurism, fairness, and sportsmanship in intercollegiate sports.<sup>38</sup> Attempting to maintain NCAA student-athletes’ amateurism, NCAA Bylaw 12.1.2 requires that NCAA student-athletes must initially qualify as amateurs and then maintain their qualifications throughout the course of their intercollegiate careers.<sup>39</sup> The NCAA’s Bylaws are at the center of the current

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enough revenues to cover their costs. See Glenn M. Wong et al., *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L.J. 1, 11 (2015) (noting “that FCS and non-football Division I [athletic] programs are not intended to be, and likely cannot be, self-sustaining. . . . Instead, FCS and Division I schools without football rely heavily on allocated revenues from the university and other sources to operate the athletic department”).

36. Smith, *supra* note 10, at 20 (citing Smith, *supra* note 34, at 367).

37. See, e.g., Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 370 (2007). Lazaroff observes that

if Congress chose to provide relief only for revenue-generating sports like major men’s football and basketball (and perhaps women’s basketball), clear conflict with Title IX would arise. Congress would have to consider and balance the political, social, and economic costs and benefits of creating any limited exceptions to Title IX’s rigorous requirements.

*Id.*

38. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 134–35 (1984) (White, J., dissenting).

39. NCAA Bylaw 12.1.2 states (with certain express exceptions for men’s ice hockey and skiing)

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; . . .
- (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and

intense debate between legal scholars, academics, business professionals, and intercollegiate sports fans as to whether NCAA student-athletes playing sports that generate substantial revenues, such as football and basketball, should receive compensation and remuneration above and beyond their athletic scholarships.<sup>40</sup> At its heart, the current debate presents profound and complex conflicts of interests and values that are not easily balanced. For example, how can the NCAA protect the revered tradition of amateur student intercollegiate athletics while maximizing the economic revenues of its member institutions? How can the NCAA emphasize its institutions' academic goals when the revenues from sports are needed by the institutions to further those academic goals? How does promoting a multi-billion dollar entertainment business comport with such goals as equity, fairness, and opportunity in student athletics?

It would seem that balancing such complex and competing values would be a job, at least in the first instance, for democratically elected legislatures working with experts, rather than the courts.<sup>41</sup> Unfortunately, Congress essentially has sat by and refused to intervene or act, leaving such issues to be addressed on an ad hoc and balkanized basis by the NCAA and its member institutions and, increasingly, to the courts in ongoing antitrust and labor and employment law cases. As discussed below, inconsistent and intellectually dishonest rule of reason decisions by the courts have created "wildly diverse and incoherent application of the Sherman Act to the NCAA's student-athlete restrictions."<sup>42</sup> The result is uncertain and inconsistent rules that do not reflect

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regulations;

(e) Competes on any professional athletics team per Bylaw 12.02.8, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; . . .

(f) After initial full-time collegiate enrollment, enters into a professional draft . . . ; or

(g) Enters into an agreement with an agent. . . .

NCAA MANUAL, *supra* note 8, art 12.1.2.

40. See, e.g., Darren Heitner, *National Letter of Indenture: Why College Athletes Are Similar to Indentured Servants of Colonial Times*, FORBES (July 25, 2012), <http://www.forbes.com/sites/darren-heitner/2012/07/25/national-letter-of-indenture-why-college-athletes-are-similar-to-indentured-servants-of-colonial-times/>; Mark Emmert, *Paying College Athletes Is a Terrible Idea*, WALL STREET J. (Jan. 11, 2012), <http://www.wsj.com/articles/SB10001424052970204257504577151212467142838>.

41. See, e.g., Stephen F. Ross & Wayne S. DeSarbo, *A Rapid Reaction to O'Bannon: The Need for Analytics in Applying the Sherman Act to Overly Restrictive Joint Venture Schemes*, 119 PENN. ST. L. REV. PENN STATIM 43, 52–54 (2015) (calling for better economic conjoint analyses in determining compensation limits for intercollegiate athletes).

42. Feldman, *supra* note 5, at 258.

a careful or meaningful balancing of the social, moral, and economic values and issues facing the NCAA and its member institutions.

### III. THE HISTORY OF ANTITRUST AND EMPLOYMENT LITIGATION INVOLVING THE NCAA

The history of antitrust and employment litigation seeking to balance the NCAA and its member institutions' conflicting social, moral, and economic values can be traced to the 1950s, when the NCAA first began seeking to exercise strong controls over its member institutions and their student-athletes.<sup>43</sup> As "the NCAA's enforcement capacity increased annually" in the 1950s and 1960s,<sup>44</sup> the NCAA began to find itself in legal disputes and litigation, seeking to define the limits of its power and authority over its member institutions and their student-athletes.

#### A. Relevant NCAA Antitrust and Employment Law Cases

##### 1. *University of Denver v. Nemeth*<sup>45</sup>

One of the earliest cases addressing the issue of the status and rights of student-athletes occurred in 1953, after a University of Denver student-athlete was accidentally injured during a football practice held on the university's property.<sup>46</sup> The student, Ernest Nemeth, who worked part-time and played football for the university in exchange for housing and additional compensation, sought workmen's compensation arguing that he was an employee of the university.<sup>47</sup> Ultimately, the Supreme Court of Colorado agreed with Mr. Nemeth's position that he was an employee of the University of Denver and ruled that the university was obligated to provide compensation to him for his football injuries.<sup>48</sup>

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43. See, e.g., Smith, *supra* note 10, at 15 ("Thus, in 1951, the NCAA began to exercise more earnestly the authority which it had been given by its members.").

44. *Id.* at 15.

45. 257 P.2d 423 (Colo. 1953).

46. *Id.* at 424.

47. *Id.* at 424-25.

48. *Id.* at 425-30. The Colorado Supreme Court explained,

Higher education in this day is a business, and a big one. . . . A student employed by the University to discharge certain duties, not a part of his education program, is no different than the employee who is taking no course of instruction so far as the Workmen's Compensation Act is concerned.

The *Nemeth* decision set off a firestorm of alarms within the NCAA and its member institutions, which catalyzed them to coin the term “student-athlete” hoping to emphasize athletes’ status as students, rather than as commercial employees, and potentially professional athletes.<sup>49</sup> The NCAA’s then-Executive Director Walter Byers explained that the term student-athlete was crafted to stanch any ideas that NCAA athletes could be considered professional athletes or employees.<sup>50</sup>

## 2. *NCAA v. Board of Regents of the University of Oklahoma*<sup>51</sup>

As televised sports increased in popularity during the 1980s and huge amounts of money began to pour into the NCAA, the NCAA found its status as the neutral and non-commercial protector of a revered tradition of amateur intercollegiate sports open to attack. The seminal 1984 antitrust case of *Board of Regents* involved an attack under section 1 of the Sherman Act<sup>52</sup> against the strict limits imposed by the NCAA on the number of football games that could be televised by its member schools.<sup>53</sup> From the outset, the Court wrestled with the question of how best to characterize the NCAA’s program of self-regulation.<sup>54</sup> Justice White and Justice Rehnquist argued in dissent that “the essentially noneconomic nature of the NCAA’s program of self-regulation”<sup>55</sup> and “[t]he legitimate noneconomic goals of colleges and universities” should exempt the NCAA’s regulations from the Sherman Act.<sup>56</sup> Justice White lauded the schools’ and NCAA’s “noneconomic values like the promotion of amateurism and fundamental education objectives,”<sup>57</sup> and noted that the NCAA’s “plan foster[ed] the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward

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*Id.* at 425–26.

49. See McCormick & McCormick, *supra* note 3, at 83–84 (“The NCAA adopted and mandated the term ‘student-athlete’ purposely to buttress the notion that such individuals should be considered students rather than employees.”).

50. See BYERS, *supra* note 15, at 69–70. Mr. Byers explained, “That threat was the dreaded notion that NCAA athletes could be identified as *employees* . . . . We [therefore] crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes.” *Id.* at 69.

51. 468 U.S. 85 (1984).

52. 15 U.S.C. § 1 (2016).

53. *Bd. of Regents*, 468 U.S. 85, 88, 94.

54. See generally *id.*

55. *Id.* at 133 (White, J., dissenting).

56. *Id.* at 134.

57. *Id.*

professionalism.”<sup>58</sup>

Unlike the dissenting Justices, the majority started with the premise that the NCAA’s challenged practices constituted an unreasonable restraint of trade under section 1 of the Sherman Act.<sup>59</sup> Nevertheless, the Court’s majority decided to analyze the restraints under the rule of reason, as opposed to a *per se* analysis, because the case “involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all.”<sup>60</sup> On the one hand, the Court praised the NCAA “as the guardian of an important American tradition”<sup>61</sup> and noted that “the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”<sup>62</sup> On the other hand, the Court found “that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA ha[d] restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.”<sup>63</sup> The Court, therefore, ruled that the NCAA’s restraints violated section 1 of the Sherman Act.<sup>64</sup>

Although the Court ruled that the NCAA and its member institutions were not exempt from the antitrust laws, it ultimately provided no clear guidance as

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58. *Id.* at 135. Justice White further urged “that associations of nonprofit educational institutions [should not have to] defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate noneconomic values they promote.” *Id.* It is interesting to note that Justice White previously was an All-American halfback for the University of Colorado football team, as well as a member of its baseball and basketball teams. He ultimately went on to play in the NFL and led the league in rushing in both 1938 and 1940. At one point, he was the NFL’s highest paid player, earning over \$15,000 per year.

59. *See id.* at 98–100 (majority opinion).

60. *Id.* at 101.

61. *Id.* at 101 n.23.

62. *Id.* at 102. The Court’s majority added,

Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.

*Id.* at 101–02.

63. *Id.* at 120.

64. *Id.*

how best to characterize and balance the NCAA's conflicting missions and competing values. The Court left open the long-term issue of how to promote educational institutions' revenue-enhancing commercial needs without overshadowing their social and moral educational missions.<sup>65</sup> Unfortunately, subsequent antitrust and employment law cases involving the NCAA and the rights of its member institutions and their student-athletes have done little to resolve this value-laden dilemma or to clear up the ongoing and increasing confusion surrounding student-athletes' eligibility and compensation.

### 3. *McCormack v. NCAA*<sup>66</sup>

Since *NCAA v. Board of Regents*, the courts generally have tried to balance the conflicting values and objectives of the NCAA and its member institutions by seeking to characterize NCAA rules, regulations, and enforcement activities as either commercial or non-commercial in nature.<sup>67</sup> For example, just four years after the Supreme Court struck down the NCAA's college football television restrictions, the Fifth Circuit upheld the dismissal of an antitrust complaint filed by Southern Methodist University (SMU) football players, cheerleaders, and alumni "contending that the NCAA violated the antitrust and civil rights laws by promulgating and enforcing rules restricting the benefits that may be awarded student athletes."<sup>68</sup> As background, by the mid-1980s, SMU built its football program from a perennial doormat into a national power. Following up on reported misconduct, the NCAA began investigating the SMU program. "The NCAA found that [SMU] had violated its rules[, which] limit[ed the amount of] compensation [available] . . . to scholarships with limited financial benefits."<sup>69</sup> Further, it was determined that SMU officials learned about the payments in the 1980s.<sup>70</sup> Due to these findings, the NCAA cancelled SMU's 1987 football season.<sup>71</sup> Additionally, the NCAA also imposed harsh penalties on future seasons.<sup>72</sup>

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65. *See id.* at 102. Justice White cogently noted that each of the NCAA's "regulations represents a desirable and legitimate attempt 'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.'" *Id.* at 123 (White, J., dissenting) (quoting *Kupec v. Atl. Coast Conference*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975)).

66. 845 F.2d 1338 (5th Cir. 1988).

67. *See, e.g.*, ABA SECTION OF ANTITRUST LAW, SPORTS AND ANTITRUST LAW 17–28 (2014).

68. *McCormack*, 845 F.2d at 1340.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* The cancellation of the 1987 season and the additional penalties placed on the program has now come to be known as the "death penalty." SMU was the first and only team to receive the death penalty.

Pointing to *Board of Regents*, the Fifth Circuit ruled “that the NCAA’s eligibility rules [were] reasonable and that the plaintiffs [had] failed to allege any facts to the contrary.”<sup>73</sup> Although the Fifth Circuit sought to dodge the commercial versus non-commercial debate, it ultimately ruled that the NCAA’s rules were a reasonable response “in the face of commercializing pressures.”<sup>74</sup>

#### 4. Subsequent Antitrust Cases

Since the 1980s, the courts have continued to struggle with questions about how best to characterize the NCAA’s rules, regulations, and enforcement activities. In a number of instances, the courts have upheld the NCAA’s rules as non-commercial restraints. For example, in *Smith v. NCAA*,<sup>75</sup> the Third Circuit rebuffed a prospective athlete’s challenge to an NCAA Bylaw prohibiting graduate students from participating in NCAA sports at an institution other than his or her undergraduate alma mater.<sup>76</sup> Upholding the dismissal of plaintiff Renee Smith’s antitrust claim under section 1 of the Sherman Act, the Third Circuit ruled that the NCAA’s Bylaw was not a commercial restraint.<sup>77</sup>

Following *Smith*, a United States district court in New Jersey upheld the NCAA Clearinghouse process used to determine incoming freshmen’s eligibility to participate in NCAA intercollegiate athletics.<sup>78</sup> The court ruled that the NCAA’s eligibility rules were not truly commercial in nature.<sup>79</sup> Similarly, the Sixth Circuit characterized various NCAA recruiting rules as “noncommercial restraints” beyond the reach of the Sherman Act in rejecting a fired University of Kentucky recruiting coordinator and assistant football

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73. *Id.* at 1343. The court noted the NCAA’s arguments that its “eligibility rules ha[d] purely or primarily noncommercial objectives” and found “some support in the caselaw” for that argument. *Id.* The court stated, however, that it need not address the argument because “the NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.” *Id.* at 1344–45 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 102 (1984); Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802, 817–18 (1981); *Tackling Intercollegiate Athletics: An Antitrust Analysis*, *supra* note 20, at 676).

74. *Id.* at 1345 (citing *Bd. of Regents*, 468 U.S. at 102; *Antitrust and Nonprofit Entities*, *supra* note 73; *Tackling Intercollegiate Athletics: An Antitrust Analysis*, *supra* note 20, at 676).

75. 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999).

76. *Id.* at 187.

77. *Id.* The Third Circuit ruled that the Bylaw protected “undergraduates from foregoing participation in athletic programs . . . to preserve eligibility on a postbaccalaureate basis at another institution.” *Id.*

78. *Bowers v. NCAA*, 9 F. Supp. 2d 460, 465–66 (D.N.J. 1998).

79. *Id.* at 497.



coach's conspiracy claims under section 1 of the Sherman Act.<sup>80</sup> Other courts followed similar reasoning in rejecting antitrust claims against the NCAA.<sup>81</sup>

Other courts, however, have found various NCAA activities to be commercial in nature. For example, just four years before its ruling in *Bassett*, the Sixth Circuit ruled that an NCAA restraint limiting the number of pre-season tournaments NCAA college basketball teams could participate in was commercial in nature.<sup>82</sup>

Similarly, in 2012, the Seventh Circuit ruled that "the transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act."<sup>83</sup> It is important to note, however, that the Seventh Circuit ultimately affirmed the district court's holding on the grounds that the plaintiffs failed to allege sufficient facts to support the potential finding of a legally cognizable relevant antitrust market.<sup>84</sup>

In determining whether NCAA student-athletes participate in a commercial market, a few courts have been receptive to such reasoning. For example, a United States district court in Washington rejected a motion to dismiss an antitrust case in 2005, challenging the number of grant-in-aid football scholarships that NCAA schools could award.<sup>85</sup> The court found that the

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80. *Bassett v. NCAA*, 528 F.3d 426, 433–34 (6th Cir. 2008).

81. *See, e.g., Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (upholding NCAA recruiting regulations as noncommercial in nature under the Sherman Act); *Tanaka v. Univ. of S. Cal.*, No. SA CV 99-663-GLT(EEEx), 1999 U.S. Dist. LEXIS 18618, at \*7 (C.D. Cal. Nov. 15, 1999), *aff'd on other grounds*, 252 F.3d 1059 (9th Cir. 2001) (upholding a Pac-10 conference rule mandating that any student-athlete who transferred from one Pac-10 school to another would lose two years of eligibility, as a noncommercial restraint); *Adidas Am., Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1280, 1286–87 (D. Kan. 1999) (rejecting the challenge of an NCAA rule limiting the size of manufacturers' trademarks on NCAA schools' equipment and uniforms as a noncommercial rule designed "to preserve the integrity of college athletics and to avoid the commercial exploitation of student athletes"); *Gaines v. NCAA*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (upholding challenged rules as having the noncommercial purpose of "prevent[ing] commercializing influences from destroying the unique 'product' of NCAA college football").

82. *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004). The Sixth Circuit ruled that the NCAA's restriction "ha[d] some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the Promoters." *Id.*

83. *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012) (citing *White v. NCAA*, CV 06-999-RGK (MANx), 2006 U.S. Dist. LEXIS 101366, at \*6–7 (C.D. Cal. Sept. 20, 2006)). The Seventh Circuit went on, however, to state that the Supreme Court's Rule of Reason analysis in *Board of Regents* implied that most NCAA regulations would constitute "a 'justifiable means of fostering competition among amateur athletic teams,' and are therefore procompetitive." *Id.* (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 117 (1984)).

84. *Id.* at 345.

85. *In re NCAA I–A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1152 (W.D. Wash. 2005).

NCAA's limitation on the number of athletic scholarships an NCAA institution could offer in various sports might be related to commercial cost-cutting interests, rather than competitive balance concerns.<sup>86</sup> A United States district court in California reached a similar ruling in a class action alleging that NCAA regulations capping the amount of financial aid a student-athlete could receive was an unlawful agreement in restraint of trade.<sup>87</sup> Some commentators argue that the court's ruling "could be read to imply that the competition between colleges and universities for student-athletes [is] sufficiently 'commercial' conduct for antitrust review."<sup>88</sup>

### 5. Non-Antitrust Challenges

In addition to antitrust challenges, aggrieved plaintiffs have sought to pursue other avenues of redress against the NCAA. For example, former University of Nevada, Las Vegas (UNLV) basketball coach Jerry Tarkanian sued the NCAA under 42 U.S.C. § 1983, alleging violations of his Fourteenth Amendment rights after the NCAA imposed various sanctions on UNLV's basketball program, and requested that it show cause why additional penalties should be imposed if UNLV failed to suspend Tarkanian.<sup>89</sup> Overruling the Nevada courts' rulings in Coach Tarkanian's favor, the Supreme Court found the NCAA's actions to be private conduct and, therefore, not subject to a state-action challenge.<sup>90</sup>

#### B. *Recent Antitrust Cases Involving the Compensation and Remuneration of NCAA Student-Athletes*

The debate about whether student-athletes are effectively employees entitled to compensation and remuneration above and beyond their scholarship packages has dogged the NCAA for decades.<sup>91</sup> Recently, high profile antitrust litigation has thrust the debate into an intense public spotlight. In *O'Bannon v.*

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86. *Id.* at 1146–47.

87. *White*, 2006 U.S. Dist. LEXIS 101366, at \*4.

88. ABA SECTION OF ANTITRUST LAW, *supra* note 67, at 25; *see also* Ray Yasser, *The Case for Reviving the Four-Year Deal*, 86 TUL. L. REV. 987, 988 (2012) (arguing that the NCAA's rule mandating that athletic scholarships be offered on a one-year renewable basis may violate the Sherman Act by limiting competition for student-athletes through offers of longer guaranteed scholarships).

89. *See generally* NCAA v. Tarkanian, 488 U.S. 179 (1988).

90. *Id.* at 191 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

91. *See* discussion *supra* Section I; SAVAGE ET AL., *supra* note 5, at 225 (noting that in 1929, "notwithstanding many statements to the contrary, the colleges and universities of the United States are confronted with acute problems of recruiting and subsidizing, especially with respect to intercollegiate football").

NCAA,<sup>92</sup> the Ninth Circuit recently affirmed in part and reversed in part United States District Judge Claudia Wilken's judgment in an antitrust bench trial challenging the NCAA's rules prohibiting student-athletes from being paid for the use of their names, images, and likenesses.<sup>93</sup> The district court held that the NCAA's amateurism rules were an unlawful restraint of trade in violation of section 1 of the Sherman Act.<sup>94</sup> The district court ordered that NCAA student-athletes were entitled to receive Name-Image-Likeness (NIL) payments of "up to \$5,000 per year in deferred compensation, to be held in trust . . . until after they le[ft] college."<sup>95</sup>

The Ninth Circuit upheld the district court's ruling that the NCAA's existing compensation rules violate section 1 of the Sherman Act "and its injunction requiring the NCAA to permit schools to provide compensation up to the full cost of attendance."<sup>96</sup> However, the Ninth Circuit ruled that "the district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses."<sup>97</sup> The Ninth Circuit, therefore, "vacate[d] the district court's judgment and permanent injunction insofar as they require[d] the NCAA to allow its member schools to pay student-athletes up to \$5,000 per year in deferred compensation."<sup>98</sup> Instead, the court ruled that "[t]he Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student-athletes. It does not require more."<sup>99</sup>

The Ninth Circuit's *O'Bannon* decision seems to raise more questions than it answers. As with so many earlier court decisions involving the NCAA, the court struggled with how to balance and weigh the NCAA's social and moral values of amateurism and academics against its clear economic and commercial values and objectives. Ultimately, the court admitted that it could not draw the line as to where amateurism in athletics ends and professionalism begins.<sup>100</sup>

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92. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

93. *Id.* at 1053. By way of disclosure, Author Horton was a signatory to the Brief of Antitrust Scholars as Amici Curiae in Support of Appellees, Supporting Affirmance, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. Jan. 28, 2015) (No. 09-cv-03329).

94. *O'Bannon*, 802 F.3d at 1053.

95. *Id.*

96. *Id.* at 1075–76. The court "reaffirm[ed] that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason." *Id.* at 1079. The court found that "the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market." *Id.*

97. *Id.* at 1076.

98. *Id.* at 1079.

99. *Id.*

100. *See id.* at 1079.

Consequently, it resorted to the Supreme Court's admonition in *Board of Regents* that courts "must afford the NCAA 'ample latitude' to superintend college athletics."<sup>101</sup> With billions of dollars at stake, the Ninth Circuit's decision is unlikely to deter future NIL and compensation antitrust lawsuits against the NCAA.<sup>102</sup>

Meanwhile, a current class action before Judge Claudia Wilken, the same district judge who decided the *O'Bannon* case, "seeks a free market for college football and men's basketball players to be paid."<sup>103</sup> The current *Jenkins* class action directly attacks the NCAA's eligibility rules.<sup>104</sup> The plaintiffs claim that the NCAA and its Power Conferences have created a cartel by placing a ceiling on the compensation that may be paid to men's basketball and football players.<sup>105</sup> They additionally allege that by disallowing member institutions to compete for the services of basketball and football players, the NCAA and the five Power Conferences violated antitrust laws.<sup>106</sup> The plaintiffs believe that the NCAA's "restrictions are pernicious, a blatant violation of the antitrust laws, have no legitimate pro-competitive justification, and should now be struck down and enjoined."<sup>107</sup>

Essentially, the *Jenkins* plaintiffs claim that under the Sherman Act, student-athletes should be afforded the opportunity to render their services to the highest bidder. Practically and pragmatically speaking, a decision for plaintiffs would professionalize college athletics. What would such a result mean for the revered tradition of academics and amateurism in intercollegiate sports?

Whether one agrees or disagrees with the *Jenkins* claims and the Ninth Circuit's *O'Bannon* decision, it seems clear that we will witness more and more

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101. *Id.* (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984)).

102. See, e.g., Michael T. Jones, *Real Accountability: The NCAA Can No Longer Evade Antitrust Liability Through Amateurism After O'Bannon v. NCAA*, 56 B.C. L. REV. E-SUPPLEMENT 79, 90 (2015) (arguing that "other courts should follow the example of *O'Bannon*'s analysis of the legal merits and economic implications of the NCAA's amateurism policies, and continue to trend away from blind deference to the NCAA").

103. Benjamin A. Tulis & Gregg E. Clifton, *Ninth Circuit Holds NCAA Subject to Antitrust Scrutiny, but Vacates Injunction Allowing up to \$5,000 per Year Deferred Compensation to College Athletes*, NAT'L L. REV. (Oct. 1, 2015), <http://www.natlawreview.com/article/ninth-circuit-holds-ncaa-subject-to-antitrust-scrutiny-vacates-injunction-allowing>.

104. See *Jenkins v. NCAA*, No. 3:14CV01678, 2014 WL 1008526 (D.N.J. Mar. 17, 2014).

105. *Id.* ¶¶ 1–2. The plaintiffs include one current student-athlete, Martin Jenkins, and three former student-athletes: Johnathan Moore, Kevin Perry, and William Tyndall. *Id.* ¶¶ 15, 17, 19, 21. The defendants include the NCAA, the Atlantic Coast Conference, the Big 12 Conference, the Big Ten Conference, the Pac-12 Conference, and the Southeastern Conference. *Id.* ¶¶ 23–25.

106. *Id.* ¶ 42.

107. *Id.* ¶ 1.

antitrust litigation against the NCAA in coming years. Is more antitrust litigation really the best way to balance the competing and conflicting values and objectives of NCAA educational institutions and their intercollegiate athletic programs, not to mention the rights of NCAA student-athletes?

*C. Potential Conclusions from Prior and Current Antitrust and Employment Cases Against the NCAA*

It is difficult to draw clear meaningful conclusions from the cacophony of balkanized judicial decisions involving the NCAA, much less predict how future cases will be decided. A recent study of forty-six student-athlete legal challenges against the NCAA between 1973 and 2014 revealed a steady and even flow of cases over the past forty-one years.<sup>108</sup> The heavy majority of the “cases involved men’s sports (89%), particularly football and basketball.”<sup>109</sup> “Overall, courts ruled 82 times, with the NCAA winning 60% of the rulings. Students completely won in 29% of decisions, and partly won in the remaining 11% of decisions.”<sup>110</sup> It seems safe to say that the courts generally have bent over backwards to afford the NCAA maximum freedom and discretion in promulgating and enforcing rules relating to its member institutions and their student-athletes’ conduct and rights. It also seems safe to predict, despite the recent *O’Bannon* decision, that the courts will continue seeking in future cases to allow the NCAA to protect intercollegiate athletics’ revered history and tradition of amateurism, sportsmanship, and fair competition.

We believe that the NCAA plays an invaluable role in protecting the social and moral values and objectives typified in intercollegiate athletics. We additionally believe that the NCAA must be afforded wide discretion and latitude in working with its member educational institutions to promote and enhance such values and goals. But we wonder whether the economics rhetoric of current American antitrust jurisprudence really allows for the most meaningful and socially beneficial discussion and balancing of the conflicting social, moral, and economic values and goals implicated by NCAA intercollegiate athletics.<sup>111</sup>

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108. LeRoy, *supra* note 4, at 482.

109. *Id.* (emphasis omitted).

110. *Id.* at 483.

111. See, e.g., ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 39–40 (2d ed. 2008); Mitten & Ross, *supra* note 11, at 876 (“The current structure of self-interested internal governance by the NCAA’s member universities, combined with external micro-regulation by means of antitrust and contract law litigation on a case-by-case basis, is not the most effective way to achieve [the NCAA’s myriad of] objective[s].”). See generally Peter C. Carstensen & Bette Roth, *The Per Se Legality of Some Naked Restraints: A*

As an example, one of the foremost goals of intercollegiate athletics is competitive fairness. Yet, “[s]teady and unremitting efforts since the 1970s by neoclassical economic theorists to excise fairness from the antitrust lexicon have been wildly successful.”<sup>112</sup> Indeed, in a non-sports antitrust case, Seventh Circuit jurist and former academic Frank Easterbrook asked: “Who says that competition is supposed to be fair . . . ?”<sup>113</sup> Furthermore, many esteemed antitrust scholars argue that antitrust should not be used to address social or moral issues.<sup>114</sup> Given antitrust’s distaste for the moral implications of conduct, can we meaningfully and fairly balance the NCAA’s laudable social and moral goals by resorting to an antitrust system seemingly focused on maximizing consumer welfare and allocative efficiency?<sup>115</sup>

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[Re]conceptualization of the Antitrust Analysis of Cartelistic Organizations, 45 ANTITRUST BULL. 349 (2000). For example, some authors observe,

Although . . . courts sometimes have articulated non-economic goals for U.S. antitrust law, their reliance on such goals as a source of useful guidance for deciding particular cases has consistently waned since the early 1970s. Non-economic goals frequently conflict with economic aims, provide too little guidance for antitrust decision makers, and arguably are ill-suited to decision-making processes that rely on adjudication and the adversary system.

GAVILET AL., *supra* note 111. Indeed, competition officials during the Bush administration urged that the “promotion of consumer welfare and the organization of free market economy are the only goals of [the] antitrust laws . . . with other economic and social objectives better pursued by other instruments.” UNILATERAL CONDUCT WORKING GROUP, INT’L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 31 (May 2007), <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf>.

112. Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 MCGEORGE L. REV. 823, 863 (2013); *see also* ELEANOR M. FOX & LAWRENCE A. SULLIVAN, CASES AND MATERIALS ON ANTITRUST 145–46 (1989) (discussing efforts of “some jurists and scholars . . . to excise fairness from the antitrust lexicon”).

113. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting in part).

114. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 10, 54 (2005) (stating that antitrust is not concerned with the moral implications of conduct—only the economic implications); Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 105 (2007) (“It has been a long time since anyone has thought about antitrust in explicitly moral terms . . .”); Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) (“[A]ntitrust has no moral content . . .”).

115. *See, e.g.,* *Chesapeake & Ohio Ry. Co. v. United States*, 704 F.2d 373, 376 (7th Cir. 1983) (“The allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field”); *see also* Marc Edelman, *The District Court Decision in O’Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2363 (2014) (citing Ken Belson, *What the O’Bannon Ruling Means for Colleges and Players*, N.Y. TIMES (Aug. 8, 2014),

“[T]he Supreme Court has consistently rejected social welfare justifications in antitrust analys[es].”<sup>116</sup> As a result, the courts too often resorted to the disingenuous and intellectually dishonest legal fiction that NCAA rules and regulations can be meaningfully evaluated based on whether they are primarily commercial or non-commercial in their purpose and effect. Consequently, complex intercollegiate athletics cases calling for a delicate balancing of social, moral, and economic values and objectives have instead been pigeon-holed into commercial and non-commercial analyses that pretend to be economically based but really involve social issues crying out for a democratic dialogue and legislative action.

As seen above, the courts repeatedly employed the legal fiction that the NCAA’s rules or regulations are non-commercial to uphold NCAA decisions and actions. Yet, the idea that any rule or regulation that the NCAA promulgates and enforces ultimately does not have some commercial impact on intercollegiate sports is simply absurd. When rules and regulations impacting the generation and allocation of billions of dollars annually are at stake, economic and commercial values are implicated. Pretending that the NCAA is not “a profit-seeking enterprise that governs multi-billion dollar entertainment products”<sup>117</sup> serves no rational or societally beneficial purposes. Refreshingly, the Seventh Circuit seemed to recognize as much in *Agnew*.<sup>118</sup>

A continuing cacophony of conflicting intercollegiate athletics antitrust and employment law decisions is not the way to rationally and coherently balance the complex and conflicting economic and non-economic values, objectives, and goals surrounding NCAA sports. What is really needed is a national discussion.

The Supreme Court long has recognized that economic regulations seeking to implement the types of social and moral values and benefits that the NCAA espouses are “properly addressed to Congress.”<sup>119</sup> With the future of amateur intercollegiate athletics at stake, it is time for the courts to step aside and Congress to step in.

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[http://www.nytimes.com/2014/08/09/sports/what-the-obannon-ruling-means-for-colleges-and-players.html?\\_r=0](http://www.nytimes.com/2014/08/09/sports/what-the-obannon-ruling-means-for-colleges-and-players.html?_r=0)) (criticizing the *O’Bannon* district court’s decision because “antitrust jurisprudence is not supposed to be about creating compromises donned in social policy. It is supposed to protect consumers and free markets.”).

116. Feldman, *supra* note 5, at 253–54.

117. *Id.* at 254–55.

118. *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012).

119. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 689 (1978).

## IV. POSSIBLE CONGRESSIONAL ACTION

It is beyond dispute that the United States has a long and revered history and tradition of encouraging and supporting intercollegiate athletics and the social and moral values they buttress. Numerous tangible and intangible benefits are bestowed upon student-athletes thanks to the NCAA and its regulations. Many major college football and college basketball student-athletes receive scholarships that cover their tuition, room, board, and textbooks. Other benefits include stipends when traveling to pay for meals and entertainment, free admission for family and friends to sporting events, clothing and equipment, insurance and medical care, paid travel expenses, personalized training, personalized nutrition plans, and first rate coaching and instruction. The funds that pay for these benefits come from the revenues generated by the NCAA, its members' athletic conferences, and the individual educational institutions.

Most importantly, student-athletes receive the benefit of a free college education. Martin Luther King Jr. once said: "Intelligence plus character—that is the goal of true education."<sup>120</sup> While academics provide student-athletes and students alike with an education, athletics further build the characters of student-athletes while promoting such values as discipline, self-confidence, accountability, and teamwork. It is, therefore, critical that we find ways to encourage and protect the social and moral values of intercollegiate activities.

With so much at stake, we must ask: "Where is Congress?" In her district court decision in *O'Bannon*, District Court Judge Wilken cogently observed,

It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here. Such reforms and remedies could be undertaken by the NCAA, its member schools and conferences, or Congress.<sup>121</sup>

Fortunately, several members of Congress have begun paying close attention to the current turmoil surrounding the NCAA and have begun considering possible legislative action.<sup>122</sup>

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120. MARTIN LUTHER KING III, THE WORDS OF MARTIN LUTHER KING, JR. 27 (2d ed. 1987).

121. *O'Bannon v. NCAA*, 7 F. Supp. 3d, 955, 1009 (N.D. Cal. 2014).

122. See, e.g., Steve Berkowitz, *More Eyes in Congress Looking at NCAA*, USA TODAY (May



### A. Possible Antitrust Exemptions for the NCAA

Following the brief NCAA regulation known as the Sanity Code, the NCAA regulations of the 1950s allowed institutions to entice student athletes with scholarships.<sup>123</sup> In 1951, while talking about the scholarship model's potential antitrust issues, NCAA attorney Philip R. Hochberg observed: "The NCAA . . . passed up the opportunity to apply for an [antitrust] exemption of its own, believing that it didn't need one because of its ties to higher education."<sup>124</sup> Mr. Hochberg probably wishes that the NCAA had pushed for an exemption, because the landscape of college athletics looks very different today than it did in the 1950s.

In the current heightened state of commercialized intercollegiate athletics, some commentators call for a broad NCAA antitrust exemption.<sup>125</sup> For example, Professor Brian Porto advocates for the College Sports Legal Reform Act, which would grant the NCAA a broad antitrust exemption "as long as at least one principal purpose of any such action is educational."<sup>126</sup> The proposed broad antitrust exemptions would give the NCAA the ability to make sweeping changes to intercollegiate athletics. Len Elmore, who has a long history in both college and professional sports, similarly advocates for a broad NCAA antitrust exemption.<sup>127</sup> Mr. Elmore contends: "The National Collegiate Athletic Association has the potential to be a central and powerful regulatory body that can offer real reform, but antitrust restrictions prevent it from regulating all aspects of intercollegiate sports."<sup>128</sup> As an example, Mr. Elmore argues that without the limits placed on it by the Supreme Court in *Board of Regents*, the NCAA would have the power to distribute revenue into a university's general

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20, 2014), Westlaw 2014 WLNR 13469908. The article notes that congressmen such as Elijah Cummings (D. Md.) and Tony Cardenas (D. Cal.) have sought to put pressure on the NCAA on growing issues such as academic fraud and head injuries. *Id.*

123. Lazaroff, *supra* note 37, at 333. The Sanity Code restricted scholarships to the "normal channels" that all students had to pursue. *Id.* (quoting ARTHUR A. FLEISHER III ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 47 (1992)). Additionally, scholarships could not be based on athletic ability. *Id.* (citing FLEISHER ET AL., *supra*).

124. Welch Suggs, *Football, Television, and the Supreme Court*, CHRON. HIGHER EDUC. (July 9, 2004), <http://chronicle.com/article/Football-Televisionthe/2342>.

125. See, e.g., Lazaroff, *supra* note 2, at 238–46, 248 (discussing the calls for an antitrust exemption for the NCAA but concluding that "application of Sherman Act principles by the courts is a better alternative than blanket immunity").

126. See BRIAN L. PORTO, THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS 188 (4th ed. 2015).

127. See Len Elmore, *Exempt the NCAA from Antitrust*, CHRON. HIGHER EDUC. (Dec. 11, 2011), <http://chronicle.com/article/Exempt-the-NCAA-From-Antitrust/130073/>.

128. *Id.*

funds and not directly back into athletic departments.<sup>129</sup>

Fortunately, a broad antitrust exemption, and a consequentially all powerful central NCAA, is not the only option.<sup>130</sup> For example, a narrow antitrust exemption might grant the NCAA the ability to make competitive reforms in certain areas subject to congressional oversight. In an effort to control the costs associated with college sports, some scholars and educators advocate for a partial antitrust exemption focused on salaries and athletic budgets.<sup>131</sup> Such an exemption could allow the NCAA to set caps on coaches and administrators' compensation, as well as team expenses without granting it a blanket antitrust immunity.<sup>132</sup>

### B. Other Possible Congressional Regulation

Rather than granting the NCAA more power, some believe that Congress needs to more heavily regulate intercollegiate athletics.<sup>133</sup> For example, Representatives Charlie Dent (R. Pa.) and Joyce Beatty (D. Oh.) introduced the National Collegiate Athletics Accountability Act on June 11, 2015.<sup>134</sup> Representatives Dent's and Beatty's bill seeks to amend the Higher Education Act of 1965 to include concussion testing, irrevocable four-year scholarships,

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129. *Id.*

130. *See, e.g.,* Lazaroff, *supra* note 2, at 247–48 (arguing that “granting a blanket antitrust exemption to the NCAA, without the farmer watching the henhouse, would be the equivalent of leaving the fox free to devour its prey”); Lazaroff, *supra* note 37, at 370 (arguing that an antitrust exemption “would also perpetuate the inequities that run rampant in the current system and make legal significantly anticompetitive conduct”).

131. *See, e.g.,* Jake New, *Presidential Panel on College Sports?*, INSIDE HIGHER ED (Jan. 13, 2015), <https://www.insidehighered.com/news/2015/01/13/ncaa-discuss-federal-oversight-college-athletics-white-house>.

132. *But see* Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998). When the NCAA sought to pass a salary cap in the 1990s, it was blocked by the Tenth Circuit. *Id.* at 1012–13, 1024. A limited antitrust exemption could rectify this ruling, which allows coaches to earn millions of dollars while their players are classified as amateurs.

133. *See, e.g.,* Lazaroff, *supra* note 37, at 369 (observing, “If the NCAA cannot resolve the problems presented by its regulation of student-athletes internally, and if the courts do not adequately address the problem, perhaps Congress will be the last resort”); Mitten & Ross, *supra* note 11, at 877 (discussing how “[a] federal regulatory commission [c]ould have the necessary authority to establish rules that [would] effectively prevent intercollegiate athletics from crossing the line between a commercial/education model and a commercial/professional model for intercollegiate sports, enhance the academic integrity of intercollegiate athletics, [and] promote more competitive balance in intercollegiate sports competition.”); Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 234–36 (2004) (discussing possible legislative approaches). *But see* Lazaroff, *supra* note 37, at 369 (arguing, “The political cross-currents that so often accompany the legislative process suggest that the viability or desirability of this alternative might be criticized severely”).

134. *See* National Collegiate Athletics Accountability Act, H.R. 2731, 114th Cong. (2015).

a ban on institutional stipends to student-athletes, and formal hearings prior to any NCAA punishment.<sup>135</sup> The proposed bill also calls for the establishment of a Presidential Commission on Intercollegiate Athletics, which would be tasked to review, analyze, and report to the President and Congress.<sup>136</sup>

Some congressional members sought to limit regulation to only the richest athletic departments. For instance, on November 20, 2013, Representative Tony Cárdenas (D. Cal.) introduced the Collegiate Student Athlete Protection Act.<sup>137</sup> This bill seeks to mandate student-athlete benefits, such as five-year athletic scholarships for those student-athletes in good academic standing, concussion testing, and the full coverage of costs associated with injury or illness.<sup>138</sup> The catch to Congressman Cárdenas's bill is that it would only apply to athletic departments generating \$10 million or more in revenue.<sup>139</sup>

Not surprisingly, both of these important pieces of potential legislation were stalled since they were referred to committee. The last major action on the proposed Collegiate Student Athlete Protection Act came on November 20, 2013, when it was referred to the House Committee on Education and the Workforce.<sup>140</sup> The National Collegiate Athletics Accountability Act has also been sitting in the House Committee on Education and the Workforce since June 11, 2015.<sup>141</sup> Nevertheless, Representatives Dent and Cárdenas formed a bipartisan caucus on the topic of student-athlete well-being.<sup>142</sup> They hope that their bipartisan caucus will inform other members of Congress about the myriad issues facing intercollegiate athletics and help to move forward proposed legislation.<sup>143</sup>

## V. CONCLUSION

American intercollegiate athletics today are in a state of crisis. Our long history and revered traditions of amateurism, academics, and fair play are in jeopardy, and the future of intercollegiate athletics and the protection and nurturing of its revered history and traditions are uncertain at best. The ongoing

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135. *Id.* § 2.

136. *Id.* § 3.

137. *See* Collegiate Student Athlete Protection Act, H.R. 3545, 113th Cong. (2013).

138. *Id.* § 2.

139. *Id.*

140. *Id.*

141. H.R. 2731.

142. Press Release, Congressman Tony Cárdenas & Congressman Charles W. Dent, Cárdenas, Dent Form Bipartisan Student-Athlete Caucus (Aug. 7, 2014), <http://cardenas.house.gov/media-center/press-releases/c-rdenas-dent-form-bipartisan-student-athlete-caucus>.

143. *Id.*

spate of antitrust and employment law cases being pursued against the NCAA is not the best way to balance the complex and conflicting array of social, moral, and economic values and objectives at stake.

We believe that it is time for Congress to get seriously involved in helping to guide and chart the future of American intercollegiate athletics. The ideas set forth in the currently proposed Collegiate Student Athletic Protection Act and the National Collegiate Athletics Accountability Act can serve as a sound starting point for meaningful analysis and discussion. We believe that legislation resulting from such a discourse can best serve the economic interests of our collegiate educational institutions and the multi-billion dollar entertainment industry while also protecting our revered history of amateurism, academics, and fair play in intercollegiate athletics, as well as the interests of our student-athletes.

We do not pretend to know how to set up a perfect intercollegiate athletics regulatory program that will help sustain the revered traditions and history of American intercollegiate athletics. However, we firmly believe that the democratic process is preferable to ongoing judicial decision-making to address the growing crisis in intercollegiate athletics. Our message to Congress is simple: It is time to get off the sidelines and play ball!